NO. 45244-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIE DARNELL BLAKENEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson, Judge

No. 12-1-03948-0

RESPONSE BRIEF OF RESPONDENT

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2. Alternatively, if the trial court committed error in admitting the victim's statement to law enforcement, was it harmless?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant was charged by information in Pierce County Superior Court cause 12-1-03948-0, and arraigned on October 19, 2012. He was charged with one count of rape in the second degree that occurred a year earlier on October 19, 2011.

The case was called for trial on June 3, 2013, before the Honorable Kathryn Nelson. The court heard motions and conducted a CrR 3.5 hearing. The jury was selected and seated on June 5, 2013, and both the victim and the defendant, among others, testified at trial. The trial concluded on June 11, 2013, and the jury returned a verdict of guilty as charged the following day. The appellant was sentenced to 130 months at the Department of Corrections on August 16, 2013. Counsel filed a notice of appeal the same day. This appeal timely follows.

2. Facts

At approximately 5:00 a.m. on October 19, 2011, F.M. was walking in the area of Tacoma Avenue and 9th Street in Tacoma, Washington. 3RP 68-69. She was alone, but had a cell phone given her for emergencies. 3RP 98. At one point appellant passed her on the street and said, "What's up?" The victim responded with, "Not you." 3RP 69. Appellant took offense to the victim's response and said, "I'm going to show you what we do to people like you." 3RP 71-72. The appellant forced F.M. to perform oral sex. 3RP 72. At one point he became angry and dissatisfied with F.M. and hit her in the face several times demanding she improve. 5RP 270-71. The blows to the face bloodied her face and split her lip. 5RP 271. Frustrated with F.M., he raped her by engaging in penile-vaginal intercourse. 3RP 72-73. He eventually stopped and they went their separate ways.

F.M. reported the rape immediately to 911 and by going to the hospital. 3RP 76. She was seen by a forensic nurse specially skilled in the examination and care of sexual assault survivors, Kelly Morris. 4RP 234-240. The nurse reported observable injuries on F.M. to include blood under her nose and caked on her lips and chin. 4RP 242. She testified the victim complained of pain to her face. 4RP 243. She also testified to

F.M.'s demeanor as F.M. relayed what happened. She described F.M. as "physically upset,... that she appeared to be very upset." 4RP 251.

Responding officer, Officer Wishard also described F.M.'s demeanor when he contacted her. He testified she appeared very distraught and frightened. 4RP 225-26. F.M. provided a handwritten statement to law enforcement in which she described the assault as outlined above. 3RP 78. This statement is the subject of appellant's assignment of error.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED THE INTRODUCTION OF VICTIM'S STATEMENT TO LAW ENFORCEMENT.

The admission of prior consistent statements is a discretionary decision of the trial court subject to reversal only if manifest abuse is shown. ***State v. Epton***, 10 Wn. App. 373, 518 P.2d 229 (1974). In the present case, the trial court did not make a decision that no reasonable person would have made, therefore, the trial court did not abuse its discretion. *See* ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). When a witness's credibility has been seriously attacked in such a way as to imply a recent fabrication of testimony, her credibility may be reestablished through the use of prior consistent statements provided the prior consistent statements were made under circumstances minimizing

the risk that the witness foresaw the legal consequences of her statement. In this case, while appellant's cross-examination was not extensive, the length or intensity of the examination is not the only determinative factor. *See e.g.,* ***United States v. Provenzano,*** 620 F.2d 985 (3rd Cir. 1980). The inferences raised in cross-examination were sufficient to allow counsel to argue that the victim had reason to fabricate her story. Additionally, the appellant's testimony implying it was a consensual act of prostitution was also clearly designed to imply the victim had fabricated her story to avoid appearing like a prostitute. Therefore, her prior consistent statements made at the time of the report were properly admitted to rebut those inferences.

The statement in question was a handwritten statement provided to law enforcement. It became exhibit 21. **Ex. 21**. The statement was given to law enforcement shortly after she reported the rape and was consistent with her trial testimony. **Ex. 21**. Appellant argues that it was admitted purely to bolster her credibility in showing that she had remained consistent in her statement of the rape. *Brf. of App., p. 8.* To the contrary, the victim's statement was admitted in the State's rebuttal case in response to appellant's testimony that the acts were consensual acts of prostitution.

The victim never implied or stated that her contact with appellant had anything to do with prostitution. However, appellant's entire case was premised on the assertion that his contact with the victim was a prostitution agreement gone awry. He testified that he went to an area he

knows to be frequented by prostitutes. 5 **RP 268**. He claimed it was not uncommon for him to engage in sex on the street. 5RP 283. He admitted to striking the victim during the act. 5 **RP 271**. He claimed it was her idea to have vaginal intercourse, again all part of an act of prostitution. 5 **RP 272.**

Additionally, in appellant's closing, counsel clearly argued that the contact with the victim was a prostitution deal. He argued that the jury should doubt the victim's explanation for being in the area. 5RP **341-42**. That if her explanation she was looking for her family were to be believed, she would have stayed in one location and not walked around. 5 **RP 342**. He alluded to her clothing, "all dressed in pink" in an attempt to imply that she was dressed as a prostitute. 5**R P341**. In support of his assertion that she was a prostitute and the acts were consensual, he argued she did not use the cell phone she had nor did not scream out to passer bys. 5**RP 342, 344.** Even if there is no express claim of fabrication, an inference that a witness has fabricated testimony is sufficient to trigger application of ER 801(d)(1). ***State v. Thomas,*** 150 Wn.2d 821, 865, 83 P.3d 970 (2004). In short, the appellant's entire case rested on his argument that the acts were consensual acts of prostitution. Appellant's testimony and the questioning of the State's witnesses clearly implied that the victim fabricated her version of events; that she had motive to lie because she was actually engaged in the illegal activity of prostitution. This line of testimony and inquiry created a need for the State to introduce her earlier statement, her

statement given before there was an allegation of prostitution. ER 801(d) provides:

A statement is not hearsay if--

> (1) **Prior Statement by Witness....**
> (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive,....

(APPENDIX A). A witness's prior consistent statements are not admissible to prove that the in-court testimony is true, the statements are admissible to rebut an alleged fabrication. ***State v. Perez***, 137 Wn. App. 97, 107, 151 P.3d 249 (2007). The proponent of the testimony must show that the witness's prior consistent statement was made before the witness's motive to fabricate arose in order to show the testimony's veracity and for ER 801(d)(1) to apply. ***State v. Thomas***, 150 Wn.2d at 865. In the present case the defendant was not located or questioned for several months after the assault. 4RP 191. The victim could not have known at the time she gave her statement to police that appellant would allege she was a prostitute. The jury was entitled to hear that the victim's challenged in-court testimony was consistent with the statement she made shortly after the assault and before she learned of appellant's allegation. The trial court did not commit error when it admitted the victim's prior consistent statement pursuant to ER 801(d)(1).

2. ALTERNATIVELY, IF THE TRIAL COMMITED ERROR IN ADMITTING THE VICTIM'S STATEMENT TO LAW ENFORCEMENT, IT WAS HARMLESS.

A trial court's evidentiary rulings are reviewed for abuse of discretion. ***State v. Lormor***, 172 Wn.2d 85, 94, 257 P.3d 624 (2011); ***Tate v. Yarbrough***, 151 Wn. App. 66, 81, 210 P3.d 1029 (2009). A trial court abuses its discretion if its decision is manifestly unreasonably or exercised on untenable grounds or for untenable reasons. ***State v. Lord***, 161 Wn.2d 276, 283 -84, 165 P.3d 1251 (2007). Such an abuse of discretion exists if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. ***Lord***, 161 Wn.2d at 284. The trial court did not abuse its discretion in this case.

"[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (*internal quotation omitted*). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose v. Clark,*** 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d

403, 409, 756 P.2d 105 (1988) ("*The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.*").

Our supreme court adopted the "overwhelming untainted evidence" test as the proper standard for harmless error analysis in Washington. ***State v. Frost***, 160 Wn.2d 765, 782, 161 P.3d 361 (2007) (*citing* ***State v. Guloy***, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed.2d 321 (1986)). Under this test, the appellate court "looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." ***Guloy***, 104 Wn.2d at 426. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error." *Id.* at 425.

In the present case, the admission of the victim's statements through the State's rebuttal witness was harmless. The jury had already been told the victim previously gave a consistent statement. 3RP78. On

direct examination, the victim testified she gave a statement to the responding detective and that it was the same as what she had just testified. 3RP78. There was no objection.

In addition, the evidence included photographs taken of the victim the night of the assault. **Exs. 2-7.** The pictures were in addition to the descriptions of the victim's demeanor provided by the responding officer and nurse. Officer Wishard described the victim as appearing very distraught and frightened. 4RP 225-26. The forensic nurse, Kelly Morris, spent over two hours with the victim. 4RP250. She testified the victim looked physically upset and was emotional when describing the assault. 4RP 251, 253. Nurse Morris also testified that as part of the examination process she asks the victim what happened. 4RP 240. She said the victim reported to her that she had been out, was attacked, hit in the face, and sexually assaulted. 4RP 241. Once again, the jury heard the victim's consistent description of events.[1]

Returning to the photographs of the victim, in closing defense counsel described the pictures as "bad," "painful" and depicting the bloody face of the victim. 5RP 341, 349, 338. In addition to her bloodied face and split lip, the medical evidence included a vaginal injury that could be consistent with nonconsensual sexual intercourse. 4RP 246-47.

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[1] Defense objection overruled; not challenged on appeal.

Also of significance is there is no dispute the victim reportedly the rape immediately. She submitted to the intrusive medical exam--which she was not mandated to do--and complied with all that was asked of her whether by medical staff or law enforcement, including testifying. 4RP 240. All of these events support the credibility of the victim's accusation that she was sexually assaulted.

Given the overwhelming amount, and nature of credible properly admitted evidence, the exclusion of the victim's statement to law enforcement admitted in the State's rebuttal case would not have resulted in a different verdict.

D. CONCLUSION.

The trial court did not error in admitting evidence of the victim's statement to law enforcement shortly after the assault. Detective Quillio's testimony in rebuttal of the victim's statement was admissible pursuant to ER 801(d)(1), prior consistent statement, and was made prior to any motive to fabricate.

Alternatively, if the trial court did error in admitting the victim's statement in the State's rebuttal case, the error was harmless given the overwhelming untainted evidence of guilt. The State requests appellant's conviction be affirmed.

DATED: March 25, 2014.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.26.14
Date Signature

APPENDIX "A"

C

West's Revised Code of Washington Annotated Currentness
Part I Rules of General Application
Washington Rules of Evidence (Er)
Title VIII. Hearsay
RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

CREDIT(S)

[Amended effective September 1, 1992.]

PIERCE COUNTY PROSECUTOR

March 26, 2014 - 4:04 PM

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